

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MARK RONALD PRAY,

Petitioner,

vs.

CRAIG FARWELL, *et al.*,

Respondents.

3:03-cv-00608-JCM-VPC

**ORDER**

Before the court for a decision on the merits is an application for a writ of habeas corpus filed by Mark Ronald Pray, a Nevada prisoner. ECF No. 56.

**I. FACTUAL AND PROCEDURAL HISTORY**

In 1996, Pray was convicted of murder in the first degree with use of a deadly weapon and sentenced to two consecutive life sentences with the possibility of parole. The facts of Pray's case are recounted in Nevada Supreme Court's decision on his direct appeal:

Appellant Mark Pray ("Pray") and his ex-wife, Marjorie Pray ("Marjorie"), were travelling north in an automobile on I-15 on their way to Mesquite, Nevada, when, by their own account, they noticed that an Isuzu pickup truck seemed to be following them. In an unsuccessful attempt to evade their pursuer, Pray began driving fast and executed a series of U-turns, crossing from the northbound to the southbound lanes of I-15. Finally, Pray slammed on his brakes, turned onto the median, and fired six shots from his .357 caliber revolver at the oncoming vehicle. One of the shots struck the driver of the vehicle, Peter Ghiglione, II ("Ghiglione") in the head, killing him. Pray later told the police that he believed the man following him in the Isuzu pickup was William "Bud" Baker ("Baker"). Baker had previously been in a relationship with Marjorie. According to Pray, he had a confrontation with Baker

1 several weeks before the shooting in which Baker had threatened him with a handgun.  
2 Pray stated that he felt that Baker was going to harm Marjorie and him.

3 After the shooting, Pray and Marjorie drove around for several hours, then  
4 checked into a motel in Pahrump. They then went to a bar and had several drinks.  
5 Pray and Marjorie then drove toward Las Vegas. At one point during the drive, Pray  
6 became angry and struck Marjorie, giving her a black eye. Pray told her to say that  
7 she hit her eye on the dashboard.

8 They later returned to the motel in Pahrump. At the motel, Pray thought that  
9 he saw one of Baker's friends, a man named Angel. Pray got his pistol out of the  
10 truck and returned to their room. Marjorie called motel security and then the police.

11 Officers of the Nye County Sheriff's Office arrived at the motel, and Pray  
12 informed them of his fears. Pray and Marjorie were taken into protective custody.  
13 The officers searched the area around the motel and found a person matching Angel's  
14 description. The officers soon learned that this person was Las Vegas Metropolitan  
15 Police Officer Larry Huggins, who was staying in Pahrump while participating in a  
16 police officer's golf tournament.

17 The police eventually questioned Pray about the Ghiglione shooting. Pray told  
18 the police that he and Marjorie were on their way to Mesquite at the time of the  
19 shooting because he had seen Baker lurking around their apartment in North Las  
20 Vegas. William Shouse ("Shouse"), who was with Pray and Marjorie at their  
21 apartment, testified that he checked outside and did not see Baker anywhere about.  
22 Shouse told Pray that Baker was not outside, but Pray did not believe him. Shouse  
23 then called Baker's residence and awakened him, ascertaining that he was, in fact, at  
24 home and not lurking near Pray's house. Shouse told Pray that Baker was at home,  
25 but still Pray refused to believe him.

26 Marjorie testified that she told Pray that the pickup truck was not Baker's  
pickup truck; it was too small. She also testified that she never saw the face of the  
man in the pickup truck and never saw any weapon in the man's possession. Neither  
the man who subsequently discovered Ghiglione's body nor the police found any  
weapon in the truck.

Pray and Marjorie admitted that prior to leaving their apartment, they had been  
smoking crack cocaine and drinking. Shouse also testified that Pray was "tweaking"  
quite a bit at this time. Shouse described "tweaking" as a crack-induced state of  
nervous paranoia. Shouse said that "tweaking" is a sign that one has smoked too  
much crack cocaine. Marjorie testified that Pray was a frequent "tweaker."

At trial, Pray claimed justifiable homicide as a defense. . . .

*Pray v. State*, 959 P.2d 530, 531 (Nev. 1998).

The Nevada Supreme Court affirmed the conviction and sentence. *Id.* at 532. On August 3,  
1998, Pray filed a post-conviction petition for writ of habeas corpus in the state district court. The

1 court found insufficient information and allegations in the petition to justify an evidentiary hearing  
2 and issued a written denial in June of 1999.

3 Pray appealed. On July 7, 2000, the Nevada Supreme Court affirmed the dismissal in part  
4 and remanded the matter to the state district court to conduct an evidentiary hearing on Pray's claim  
5 that members of the jury interacted with the state's investigator and the victim's family during the  
6 trial. The Nevada Supreme Court denied Pray's petition for rehearing.

7 The state district court held an evidentiary hearing in May of 2001. In June of 2002, the court  
8 issued a written order denying the post conviction relief, in which it found, based on the testimony  
9 and affidavits of the jurors, that there appeared to be no misconduct by the jurors and no private  
10 communication between the victim's family members and the jurors. Pray appealed. In August of  
11 2003, the Nevada Supreme Court upheld the denial of Pray's state habeas petition.

12 Pray mailed his *pro se* federal petition for writ of habeas corpus to this court on November 5,  
13 2003. ECF No. 6. The court appointed counsel; and, on December 21, 2004, Pray filed his first  
14 amended petition (ECF No. 16).

15 Respondents moved to dismiss the petition. ECF No. 31. This court granted respondents'  
16 motion in part, finding Grounds Two, Six(D), Six(F), and Six(G)(2) to be unexhausted. ECF No. 48.  
17 Pray moved for stay and abeyance in order to pursue exhaustion, which this court granted. ECF Nos.  
18 49-51.

19 On September 1, 2006, Pray filed his second state habeas petition, which the state then  
20 moved to dismiss. The state district court denied the petition, finding that it was time  
21 barred pursuant to NRS 34.726, successive pursuant to NRS 34.810, and barred by the doctrine of  
22 laches pursuant to NRS 34.800. The court further found that Pray failed to demonstrate  
23 actual cause or substantial prejudice to overcome the procedural bars.

24 Pray appealed. The Nevada Supreme Court affirmed the district court's decision to deny the  
25 petition. On July 16, 2008, Pray moved to reopen the federal case before this court. ECF No. 52.

1 The court having granted the motion, Pray filed his second amended petition for writ of habeas  
2 corpus on January 13, 2009. ECF No. 56. On May 1, 2009, respondents filed a motion to dismiss  
3 claiming that the petition is a mixed petition and that many of the claims are time-barred or  
4 procedurally barred. ECF No. 61. Pursuant to that motion, this court dismissed several claims from  
5 the second amended petition. ECF No. 77. Grounds Three, Five, Six(A), Six(B), Six(C), Six(E),  
6 Six(G)(1), Six(H), Six(I), and Seven remain before the court for a decision on the merits.

## 7 II. STANDARDS OF REVIEW

8 This action is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28  
9 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

10 An application for a writ of habeas corpus on behalf of a person in custody  
11 pursuant to the judgment of a State court shall not be granted with respect to any  
12 claim that was adjudicated on the merits in State court proceedings unless the  
13 adjudication of the claim –

14 (1) resulted in a decision that was contrary to, or involved an unreasonable  
15 application of, clearly established Federal law, as determined by the Supreme Court of  
16 the United States; or

17 (2) resulted in a decision that was based on an unreasonable determination of  
18 the facts in light of the evidence presented in the State court proceeding.

19 28 U.S.C. § 2254(d).

20 A decision of a state court is “contrary to” clearly established federal law if the state court  
21 arrives at a conclusion opposite that reached by the Supreme Court on a question of law or if the  
22 state court decides a case differently than the Supreme Court has on a set of materially  
23 indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). An “unreasonable  
24 application” occurs when “a state-court decision unreasonably applies the law of [the Supreme  
25 Court] to the facts of a prisoner’s case.” *Id.* at 409. “[A] federal habeas court may not “issue the  
26 writ simply because that court concludes in its independent judgment that the relevant state-court  
decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 411.

1       The Supreme Court has explained that “[a] federal court’s collateral review of a state-court  
2 decision must be consistent with the respect due state courts in our federal system.” *Miller-El v.*  
3 *Cockrell*, 537 U.S. 322, 340 (2003). The “AEDPA thus imposes a ‘highly deferential standard for  
4 evaluating state-court rulings,’ and ‘demands that state-court decisions be given the benefit of the  
5 doubt.’” *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7  
6 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam)). “A state court’s determination  
7 that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’  
8 on the correctness of the state court’s decision.” *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011)  
9 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized  
10 “that even a strong case for relief does not mean the state court’s contrary conclusion was  
11 unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v.*  
12 *Pinholster*, 131 S.Ct.1388, 1398 (2011) (describing the AEDPA standard as “a difficult to meet and  
13 highly deferential standard for evaluating state-court rulings, which demands that state-court  
14 decisions be given the benefit of the doubt”) (internal quotation marks and citations omitted).

15       “[R]eview under § 2254(d)(1) is limited to the record that was before the state court that  
16 adjudicated the claim on the merits.” *Pinholster*, 131 S.Ct. at 1398. In *Pinholster*, the Court  
17 reasoned that the “backward-looking language” present in § 2254(d)(1) “requires an examination of  
18 the state-court decision at the time it was made,” and, therefore, the record under review must be  
19 “limited to the record in existence at that same time, i.e., the record before the state court.” *Id.*

20       For any habeas claim that has not been adjudicated on the merits by the state court, the  
21 federal court reviews the claim *de novo* without the deference usually accorded state courts under 28  
22 U.S.C. § 2254(d)(1). *Chaker v. Crogan*, 428 F.3d 1215, 1221 (9<sup>th</sup> Cir. 2005); *Pirtle v. Morgan*, 313  
23 F.3d 1160, 1167 (9<sup>th</sup> Cir. 2002). *See also James v. Schriro*, 659 F.3d 855, 876 (9<sup>th</sup> Cir. 2011) (noting  
24 that federal court review is *de novo* where a state court does not reach the merits, but instead denies  
25 relief based on a procedural bar later held inadequate to foreclose federal habeas review). In such  
26

1 instances, however, the provisions of 28 U.S.C. § 2254(e) still apply. *Pinholster*, 131 S.Ct at 1401  
2 (“Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas  
3 relief.”); *Pirtle*, 313 F.3d at 1167-68 (stating that state court findings of fact are presumed correct  
4 under § 2254(e)(1) even if legal review is *de novo*).

5 Lastly, the Court in *Lockyer* rejected a Ninth Circuit mandate for habeas courts to review  
6 habeas claims by conducting a *de novo* review prior to applying the “contrary to or unreasonable  
7 application of” limitations of 28 U.S.C. § 2254(d)(1). *Lockyer*, 538 U.S. at 71. In doing so,  
8 however, the Court did not preclude such an approach. “AEDPA does not require a federal habeas  
9 court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1) –  
10 whether a state court decision is contrary to, or involved an unreasonable application of, clearly  
11 established Federal law.” *Id.*

### 12 III. ANALYSIS OF CLAIMS

#### 13 **Ground Three**

14 In Ground Three, Pray claims that his constitutional rights have been violated because there  
15 was not sufficient evidence to convict him of first degree murder. The Nevada statutes define first  
16 degree murder, in relevant part, as a “willful, deliberate and premeditated killing.” Nev. Rev. Stat. §  
17 200.030(1)(a). According to Pray, the evidence presented at trial supported his claim of self-defense  
18 and failed to establish that he intended to kill Peter Ghiglione

19 The standard used by the federal habeas court to test whether sufficient evidence supports a  
20 state conviction is the “rational factfinder” standard established in *Jackson v. Virginia*, 443 U.S. 307  
21 (1979). *Mikes v. Borg*, 947 F.2d 353, 356 (9<sup>TH</sup> Cir. 1991). Under that standard, the court inquires as  
22 to “whether, after viewing the evidence in the light most favorable to the prosecution, any rational  
23 trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”  
24 *Jackson*, 443 U.S. at 319 (citation omitted).

1 In addressing Pray's sufficiency of evidence claim on direct appeal, the Nevada Supreme  
2 Court ruled as follows:

3 . . . Pray argues that insufficient evidence existed to convict him of  
4 first-degree murder because "there is nothing to support or even suggest that [he]  
5 meant to kill anyone when the shots were fired in what he believed was an attempt to  
6 prevent injury to himself or Marjorie." Pray further contends that the "keystone cop  
7 nature of the entire chase mitigates against the actions being first-degree murder."

8 It is well settled that this court will not overturn a criminal conviction for lack  
9 of sufficient evidence so long as "the jury, acting reasonably, could have been  
10 convinced of the defendant's guilt beyond a reasonable doubt by the evidence that  
11 was properly before it." *Lay v. State*, 110 Nev. 1189, 1192, 886 P.2d 448, 450  
(1994).

12 In the present case, the State presented evidence that Pray turned his vehicle  
13 around on the highway median and fired six shots from a large caliber handgun at the  
14 driver's compartment of Ghiglione's oncoming vehicle. We conclude that from this  
15 evidence, a reasonable jury could have found the intent required for first-degree  
16 murder.

17 ECF No. 21, p. 78-79.<sup>1</sup>

18 Under Nevada law, "the intention to kill may be ascertained or deduced from the facts and  
19 circumstance of the killing, such as the use of a weapon calculated to produce death, the manner of  
20 use, and the attendant circumstances characterizing the act." *Moser v. State*, 544 P.2d 424, 426  
21 (Nev. 1975). Beyond the evidence cited by the Nevada Supreme Court in rejecting this claim,  
22 additional evidence supported a finding that Pray was not acting in self-defense; that being  
23 Marjorie's testimony that she told Pray that the pickup truck was not Baker's pickup truck, that she  
24 never saw the face of the man in the pickup truck, and that she never saw any weapon in the victim's  
25 possession. The evidence also established that Pray bypassed the chance to stop in a populated area,  
26 did not contact authorities after the shooting, and admitted to an investigating detective that he never  
saw the victim with a gun.

This court concludes that there was sufficient evidence for a rational jury to find beyond a  
reasonable doubt that Pray's conduct satisfied the elements of first degree murder under Nevada law.

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<sup>1</sup> References to page numbers in the record are based on CM/ECF pagination.

1 Thus, Pray is not entitled to habeas relief under the *Jackson* standard, especially in light of the extra  
 2 layer of deference imposed by AEDPA. *See Boyer v. Belleque*, 659 F.3d 957, 964 -65 (9<sup>th</sup> Cir.  
 3 2011) (noting that “the state court's application of the *Jackson* standard must be ‘objectively  
 4 unreasonable’ to warrant habeas relief for a state prisoner).

### 5 **Ground Five**

6 In Ground Five, Pray contends that his constitutional rights were violated because the jury  
 7 instruction defining implied malice created an improper presumption, thereby minimizing the State’s  
 8 burden of proof. The challenged instruction read as follows:

9 Express malice is that deliberate intention unlawfully to take away the life of a  
 10 fellow creature, which is manifested by external circumstances capable of proof.

11 Malice shall be implied when no considerable provocation appears, or when  
 12 all the circumstances of the attempted killing show an abandoned and malignant  
 heart.

13 ECF No. 20, p. 245. Pray argues that the instruction, while consistent with the definition of malice  
 14 contained in the Nevada statute (i.e., Nev. Rev. Stat. § 200.020), involved a presumption governed  
 15 by Nev. Rev. Stat. § 47.320 and, therefore, necessitated an instruction that its existence must be  
 16 proved beyond a reasonable doubt. According to Pray, the instruction violated his constitutional  
 17 rights by creating a reasonable likelihood that the State would be relieved of its burden to prove each  
 18 element of the crime beyond a reasonable doubt.

19 In *Estelle v. McGuire*, 502 U.S. 62 (1991), the Supreme Court outlined the proper inquiry for  
 20 determining the constitutional validity of a jury instruction:

21 . . . [T]he fact that the instruction was allegedly incorrect under state law is not  
 22 a basis for habeas relief. Federal habeas courts therefore do not grant relief, as might  
 23 a state appellate court, simply because the instruction may have been deficient in  
 24 comparison to the [state’s model instructions]. The only question for us is “whether  
 25 the ailing instruction by itself so infected the entire trial that the resulting conviction  
 26 violates due process.” *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). It is well  
 established that the instruction “may not be judged in artificial isolation,” but must be  
 considered in the context of the instructions as a whole and the trial record. *Cupp v.*  
*Naughten, supra*, 414 U.S., at 147. In addition, in reviewing an ambiguous  
 instruction such as the one at issue here, we inquire “whether there is a reasonable



1 likelihood that the jury has applied the challenged instruction in a way” that violates  
2 the Constitution. *Boyde v. California*, 494 U.S. 370, 380 (1990). And we also bear in  
3 mind our previous admonition that we “have defined the category of infractions that  
4 violate ‘fundamental fairness’ very narrowly.” *Dowling v. United States*, 493 U.S.  
5 342, 352 (1990). “Beyond the specific guarantees enumerated in the Bill of Rights,  
6 the Due Process Clause has limited operation.” *Ibid*.

502 U.S. at 71-72.

In adjudicating this claim on direct appeal, the Nevada Supreme Court concluded:

7 Pray also argues that the jury instructions regarding deliberation and implied  
8 malice were constitutionally infirm. However, we have previously rejected both these  
9 contentions. *See Doyle v. State*, 112 Nev. 879, 900, 921 P.2d 901, 915 (1996)  
(reaffirming the holding of *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992)).

10 ECF No. 21, p.80. In *Doyle*, the Nevada Supreme Court held that any ambiguity as to the State’s  
11 burden of proof arising from the challenged instruction was cured by a separate instruction that  
12 “[t]he defendant is presumed innocent until the contrary is proved” and that “[t]his presumption  
13 places upon the State the burden of proving beyond a reasonable doubt every material element of the  
14 crime charged.” *Doyle*, 921 P.2d at 901-02. The jury in Pray’s case was issued a nearly identical  
15 instruction. ECF No. 20, p. 274.

16 Pray provides no argument as to how the Nevada Supreme Court’s decision is contrary to, or  
17 an unreasonable application of, clearly established federal law. In the absence of any Supreme Court  
18 precedent directing, or even suggesting, a different outcome, the state court decision must be  
19 accorded deference under § 2254(d)(1). *See Wright v. Van Patten*, 552 U.S. 120, 125–26 (2008); *see*  
20 *also Carey v. Musladin*, 549 U.S. 70, 76–77 (2006).

21 Moreover, any error arising from the jury instruction is harmless. The jury in Pray’s case  
22 found him guilty of first degree murder because it found that the murder was a willful, deliberate,  
23 and premeditated act. The elements of willfulness, premeditation, and deliberation conclusively  
24 establish express malice, with no need to rely upon implied malice. *Scott v. State*, 554 P.2d 735, 738  
25 (Nev. 1976).

1 Ground Five is denied.

2 **Ground Six**

3 In Ground Six, Pray claims that he was denied his constitutional right to effective assistance  
4 of counsel due to various acts and omissions committed by counsel throughout the course of the  
5 criminal proceedings against him.

6 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two  
7 prong test for analysis of claims of ineffective assistance of counsel: a petitioner claiming ineffective  
8 assistance of counsel must demonstrate (1) that the defense attorney's representation "fell below an  
9 objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced  
10 the defendant such that "there is a reasonable probability that, but for counsel's unprofessional  
11 errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

12 *Ground Six(A)*

13 Ground Six(A) alleges that counsel's failure to object to various instances of prosecutorial  
14 misconduct constituted ineffective assistance of counsel. These instances include one point during  
15 trial when the prosecutor argued that a written statement provided by a certain witness was work  
16 product (and therefore inadmissible) and four separate points during closing argument when the  
17 prosecutor made allegedly improper comments.

18 As to the former, Pray cites to the following:

19 Very well, Your Honor. I would note for the record though that the item is  
20 work product when I discovered Mr. Shouse as a witness. Just as Mr. Smith could  
21 have done at any time in this case, I had my investigator and he sit down and have  
22 him jot down some of the things he remembered. So the Court should know that is  
23 exactly what that is, attorney work product. I do not acquiesce to Mr. Smith  
24 introducing my work product into evidence since in the past two and a half years he  
25 could have generated his own work product.

26 . . .

27 This was not discovery in the ordinary course of a police investigation in this  
28 matter. This was merely done by Mr. Lovelace, my investigator and I finding Mr.  
29 Shouse, going out and talking and having him jot down notes which Mr. Smith could

1 do. And I don't believe I've received anything from any of the witnesses that Mr.  
2 Smith has spoken to.

3 ECF No. 19, p. 124-25. With respect to the prosecutor's closing argument, Pray claims these  
4 comments improperly tried to quantify reasonable doubt and urged the jury to put a value on human  
5 life:

6 In this particular case, the word 'reasonable' is not defined in the instructions.  
7 In fact, it's your life experiences that you bring to this jury that are going to have to be  
8 used to determine and define the word 'reasonable.' To do that, you're going to have  
to, in fact, put a value on human life and determine what type of circumstances justify  
the taking of that human life.

9 ECF No. 20, p. 140-41. He claims that this was an improper personal opinion as to the defendant's  
10 guilt:

11 The truly [sic] only question in this case is was the killing of Peter Ghiglione  
12 justified as being a killing in self-defense. Obviously, I say it was not.

13 *Id.*, p. 146. He claims these comments were improper because prosecutor stated that the defendant  
14 was lying and implicitly referred to the fact that Pray did not testify at trial:

15 But all those people are lying. But the man—the one man with the motive to  
16 fabricate here, the one man whose, as Mr. Smith put it, life is on the line, he is telling  
17 the truth. Him, you should believe, but all these people who came to court and sat  
under oath and told you these things with no motive to fabricate, they're lying.  
They're lying.

18 *Id.*, p. 210. He claims these comments were improper because they indirectly called attention to  
19 Pray's decision to not testify:

20 Now, let's talk about the defendant, Mr. Consistent – let's talk about what he  
21 has to say in this case. Well, we got his first little work of authorship, the note from  
the Saddle West, and I read: 'I cut through the median four times with him gaining on  
22 us. The last trip through the median he was aiming a gun.' Signed, M.P.

23 Aiming a gun. I didn't hear anything about loaded fingers, and I'm not reading  
anything about loaded fingers here. Aiming a gun. Even spelled gun right, to make  
24 sure. No 'I thought I saw a gun', no nothing. A gun. And we know Pete Ghiglione  
didn't have a gun. Does that seem secure? Pete didn't even own any gun, and he  
25 didn't have a gun that night, and that's not in dispute. But the defendant saw a gun.  
26

1 But then to Detective Huggins, he saw a gun and then he saw something. And  
2 then to Detective Jackson, 'I didn't see a gun.' Well, which is it, Mr. Defendant, did  
3 you see a gun or did you not see a gun? Was it a finger shaped like a gun? What was  
4 it? I guess nobody beat you into your story. So at Saddle West on the paper, it's a  
5 gun. To Huggins, it might be a gun. To Jackson, it's never a gun. To Margie, at first  
6 there was a gun, then I guess there's no gun.

7 We know the story, ladies and gentlemen, there's no gun. This is the man  
8 with the motive to fabricate. Oh, while everybody else is lying, everybody else is  
9 making stuff up about this poor guy, this guy is the one. The gun, not a gun, gun, not  
10 a gun.

11 *Id.*, p. 216-18.

12 Pray presented the foregoing claim of ineffective assistance of counsel to the Nevada  
13 Supreme Court in his first state post-conviction proceeding. The state supreme court addressed the  
14 claim as follows:

15 Pray argues that he received ineffective assistance of counsel because his  
16 attorney failed to object to several instances of alleged prosecutorial misconduct at the  
17 trial. [Footnote1 – Due to trial counsel's failure to object to the five alleged instances  
18 of prosecutorial misconduct, this court declined to review the allegation on direct  
19 appeal. *See Pray v. State*, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998).] Pray first  
20 argues that the prosecutor committed misconduct by arguing that notes, which  
21 indicated when the State discovered a certain witness, were work product and  
22 therefore not admissible at trial. We conclude that the prosecutor offered a reasonable  
23 legal argument detailing his basis for claiming that the notes were work product.  
24 Second, Pray fails to claim any prejudice suffered simply because his attorney failed  
25 to object to this legal argument. Pray does not even suggest on what grounds his  
26 attorney should have objected. In fact, Pray merely quotes the argument made by the  
27 prosecutor and then concludes that his attorney was ineffective for failing to object.  
28 Therefore, we hold that Pray has failed to demonstrate that trial counsel was deficient.

29 Second, Pray argues that he received ineffective assistance of counsel because  
30 his trial counsel failed to object when the prosecutor improperly defined the  
31 reasonable doubt standard. However, Pray only includes a portion of the prosecutor's  
32 statement as evidence that he improperly attempted to quantify the reasonable doubt  
33 standard. After a thorough review of the record, we conclude that it is clear that the  
34 prosecutor was not attempting to quantify or define the reasonable doubt standard. In  
35 fact, it is quite clear that the prosecutor was referring to the reasonableness of Pray's  
36 actions the night of the shooting and that his comments had nothing to do with the  
37 reasonable doubt standard, as claimed by Pray. Therefore, we conclude that Pray has  
38 failed [to] establish that trial counsel was deficient.

39 Third, Pray claims that the prosecutor improperly injected his personal beliefs  
40 into the proceedings. During closing arguments, the prosecutor stated:

1 The truly only question in this case is was the killing of Peter  
 2 Ghiglione justified as being a killing in self-defense? Obviously, I say  
 3 it was not. The instructions that you have on that point helping you  
 4 understand the law of self-defense are set forth in Instructions 28  
 through 34, and you can refer to those when you go back. [Footnote2  
 – Again, counsel for Pray fails to include the full context of the  
 quotation, only quoting the most suspect portion of the statement.]

5 This court has held that a prosecutor should not inject his personal opinion  
 6 into an argument before the jury. *See Aesoph v. State*, 102 Nev. 316, 332, 721 P.2d  
 379, 383 (1986). However, Pray fails to demonstrate that he suffered any prejudice  
 7 from the failure of his attorney to object to this statement of the prosecutor. The  
 8 statement of the prosecutor was merely a statement of the obvious position of the  
 State; that this was not an incident of self-defense; otherwise, the State would not  
 9 have charged Pray with first-degree murder. Additionally, the prosecutor does not  
 divert the jury's attention from their proper focus. In fact, the prosecutor references  
 10 the relevant instructions that the jury should examine in deciding the issue of self-  
 defense. Also, the prosecutor's statement does not appear to rise to the level of  
 11 misconduct as that term is defined in Nevada cases. *See Collier v. State*, 101 Nev.  
 473, 478, 705 P.2d 1126, 1129 (1985) (case remanded for a new penalty hearing  
 12 because the prosecutor's comments "sought to promote a conclusion that Collier's  
 rehabilitation was improbable, that he might well kill again while in prison, and that  
 he should therefore be put to death"). Therefore, we conclude that Pray has failed to  
 demonstrate that trial counsel was deficient.

13 Further, Pray argues that the prosecutor improperly alluded to the fact that  
 14 Pray lied or had motive to fabricate and also commented on Pray's failure to testify at  
 trial. The questionable statements were made during the State's rebuttal closing  
 15 remarks, in response to defense counsel calling into question the veracity and  
 reliability of the State's witnesses. However, the district court instructed the jury to  
 16 ignore the opinions of counsel offered during argument. Further, Pray has failed to  
 show that he suffered any prejudice from the alleged prosecutorial misconduct.  
 17 Finally, after extensive review of the record, we are unable to find any reference,  
 implied or explicit, to Pray's failure to testify. Therefore, we conclude that Pray has  
 18 failed to establish that trial counsel was deficient.

19 ECF No. 21, p. 344-47.

20 Applying the § 2254(d) standard to the state court's decision, there are ample grounds upon  
 21 which fair-minded jurists could agree with the state court's determinations that either counsel's  
 22 performance did not fall below an objective standard of reasonableness or that Pray was not  
 23 prejudiced by counsel's failure to object. The prosecutor's argument regarding the admissibility of  
 24 the witness's statement was nothing more than an argument as to an evidentiary matter to which  
 25  
 26

1 Pray's counsel responded. ECF No. 19, p. 124-25. The Nevada Supreme Court was correct in  
2 concluding that the comments were neither objectionable, nor prejudicial.

3 The Nevada Supreme Court was also correct in noting that the prosecutor's comments about  
4 the how to define "reasonable" were in relation to the defendant's conduct, not the standard of proof  
5 required to find the defendant guilty. ECF No. 20, p. 140-41. Pray cites to no legal authority to  
6 support his claim that the prosecutor's comment about the jury placing a value on human life was  
7 prosecutorial misconduct. Likewise, to the extent the prosecutor's remark that the killing was not  
8 justifiable as self-defense was an improper expression of his personal opinion, it was so fleeting and  
9 innocuous that it could hardly be characterized as prejudicial prosecutorial misconduct.

10 Lastly, the Nevada Supreme Court's determinations that the prosecutor's statements about  
11 Pray lying and his failure to testify were also a reasonable application of federal law. During closing  
12 argument, the prosecutor is permitted to argue reasonable inferences based on the evidence. *United*  
13 *States v. Molina*, 934 F.2d 1440, 1445 (9<sup>th</sup> Cir. 1991). And, like the Nevada Supreme Court, this  
14 court is unable to locate any mention, explicit or implicit, of Pray's failure to testify at trial. If  
15 anything, an objection from defense counsel would have only risked drawing the jury's attention to  
16 the fact.

17 Pray is not entitled to relief based on Ground Six(A).

18 *Ground Six(B)*

19 Ground Six(B) alleges that counsel rendered ineffective assistance by telling the jury, in his  
20 opening statement, that Pray would testify, then deciding to not call him as a witness. During his  
21 opening statement, defense counsel made several references to anticipated testimony from Pray.  
22 ECF No. 19, pp. 55, 57, 60, 61-63. Counsel told the jury that Pray's testimony would provide a more  
23 credible account of the confrontation several weeks before the shooting in which Baker pointed a  
24 gun at Pray and would establish that Pray never approved of Baker visiting his home, that Baker was  
25 on the other side of his door with a gun and a bottle on the night of the shooting, and that Pray  
26

1 suspected that Baker was following them on the night of the shooting. *Id.* Toward the end of the  
2 trial, the court informed Pray of his constitutional right against self-incrimination. ECF No 20, p.  
3 91-94. Defense counsel then notified the court that Pray would not testify. *Id.*, p. 95-96.

4 Pray presented this claim to the Nevada Supreme Court in his first state post-conviction  
5 proceeding. The state supreme court addressed the claim as follows:

6 Pray also alleges that his attorney was ineffective for failing to call Pray as a  
7 witness. The district court noted that Pray was canvassed by the district court  
8 regarding his right to testify or not testify, that Pray indicated that he understood that  
9 right, and that he decided to not testify. Although trial counsel did state that Pray  
10 would testify during opening statements, Pray has failed to demonstrate that his  
counsel was deficient by advising Pray to not take the stand in his own defense. *See*  
*Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (holding that trial  
counsel's strategy decisions are not subject to challenge absent extraordinary  
circumstances).

11 ECF No. 21, p. 348.

12 Given the conflicting statements Pray had given the police and the evidence that he was  
13 “tweaking” on the day of the shooting, counsel certainly had legitimate reasons for not calling Pray  
14 as a witness. Thus, the state supreme court may have been reasonable in concluding that counsel  
15 was not ineffective in failing to call Pray as a witness. However, the court did not address the crux  
16 of Pray’s claim – i.e., that counsel created an expectation for the jury that he subsequently failed to  
17 meet.

18 Unfulfilled promises by defense counsel to present personal testimony from a criminal  
19 defendant are highly suspect under *Strickland*. *Barrow v. Uchtman*, 398 F.3d 597, 606–07 (7<sup>th</sup> Cir.  
20 2005); *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257–60 (7<sup>th</sup> Cir. 2003). Viewed in  
21 isolation, counsel’s decision to not call Pray as a witness is a strategic decision well within the  
22 bounds objective standards of reasonableness. Far less defensible is counsel telling the jury that Pray  
23 would testify about the events surrounding the shooting, then not calling him as a witness.

24 Even so, this court is not convinced that there is a strong possibility that counsel’s error  
25 affected the outcome of the trial. *See Strickland*, 466 U.S. at 693–94. The prejudice that potentially  
26



1 results from promising testimony then not presenting it is that the jury may infer that the testimony  
2 would have been adverse to the defense. *Hampton*, 347 F.3d at 259-60.

3 *Hampton and Ouber v. Guarino*, 293 F.3d 19 (1<sup>st</sup> Cir. 2002), are the two cases cited by Pray  
4 in which counsel failed to deliver defendant's testimony as promised and the court concluded that  
5 habeas relief was warranted. In both those cases, the court unequivocally found attorney error, but  
6 the circumstances were such that the amount of prejudice needed to change the outcome of the case  
7 was not great. In *Hampton*, counsel's unfulfilled promise regarding the defendant's testimony  
8 merely added to a more serious error by counsel. 347 F.2d at 260 ("Although we agree with the  
9 district court that [counsel's] breach of the promises he made in the opening statement was not so  
10 prejudicial that it would support relief in and of itself, the breach serves to underscore the more  
11 important failure to investigate exculpatory occurrence witnesses."). In *Ouber*, the trial at issue was  
12 defendant's third and her two prior trials, at which she did testify, ended in hung juries. 293 F.3d at  
13 35 ("[T]his was the petitioner's third trial and the only salient difference between it and the two prior  
14 trials was the absence of her testimony.").

15 As noted above, the jury in this case had ample grounds, aside from counsel's failure to  
16 deliver promised testimony, to discredit Pray's theory of self-defense, including the testimony of an  
17 eye-witness, Marjorie, and Pray's own statements to the police. Moreover, counsel did not, in his  
18 opening statement, emphasize Pray's anticipated testimony as central to the defense's case, but  
19 instead mentioned it, for the most part, in relation to tangential issues. *Cf. Ouber*, 293 F.3d at 22  
20 (noting that counsel told the jury: "The case is going to come down to what happened in that car and  
21 what your findings are as you listen to the credibility and the testimony of [undercover agent] Todd  
22 Shea versus what your findings are as you listen to the testimony of [defendant] Barbara Ouber." ).<sup>2</sup>

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24 <sup>2</sup> Defense counsel in *Ouber* also told the jury, referring to Shea and the defendant: "And you're  
25 going to have to decide the truth and veracity of those two witnesses; and that will be your ultimate  
26 decision in this case." *Id.*



1 Unlike in the cases cited by Pray, there is not a reasonable probability that counsel's comments about  
2 Pray testifying changed that outcome of the proceeding.

3 Pray is not entitled to relief based on Ground Six(B).

4 *Ground Six(C)*

5 Ground Six(C) alleges that counsel's failure to call witnesses to establish crucial facts for the  
6 defense constituted ineffective assistance of counsel. According to Pray, effective counsel would  
7 have called several witnesses that his counsel did not – i.e., a defense investigator (Jim Thomas ), a  
8 passing motorist who allegedly witnessed the shooting (Neil Stiller), Ghiglione's girlfriend (Michelle  
9 Richards), Michelle Richards' brother (Alan Richards), Marjorie Pray, and a friend of Pray's who  
10 also knew William Baker (Stephen Jackson).

11 Pray presented this claim to the Nevada Supreme Court in his first state post-conviction  
12 proceeding. The state supreme court addressed the claim as follows: :

13 Pray next argues that trial counsel was ineffective for failing to call several  
14 specific witnesses. Pray alleges that trial counsel was ineffective for not calling  
15 Marjorie Pray to testify. We note that the record very clearly states that Marjorie was  
16 unable to be located for the trial, and testimony given by Marjorie at the preliminary  
17 hearing was read into the record. Therefore, we conclude that trial counsel was not  
18 ineffective for failing to call Marjorie.

19 Pray also alleges that trial counsel was ineffective for failing to call Neil  
20 Stiller to testify that he observed shots being fired from both Pray's and Ghiglione's  
21 vehicles in the median. We find that the allegation of shots being fired from both  
22 vehicles is repelled by the record, because no weapons were found in Ghiglione's  
23 truck, there was no damage to Pray's truck from bullet holes, neither Pray nor  
24 Marjorie received any injuries, and, finally, the man who discovered Ghiglione did  
25 not find a gun in Ghiglione's vehicle. Therefore, we conclude that Pray has failed to  
26 demonstrate that counsel was deficient in any manner.

21 Pray also alleges that trial counsel was ineffective for failing to call Michelle  
22 Richards ("Michelle"), Ghiglione's girlfriend, to testify at trial. We conclude that the  
23 proffered testimony from Michelle was irrelevant and inadmissible hearsay. We  
24 further conclude that it was also a strategic decision on behalf of the defense not to  
25 call Michelle. *See Dolman [v. State 921 P.2d 278, 280-81 (Nev. 1996).]*

24 Pray finally alleges that counsel was ineffective for failing to call Stephen  
25 Jackson ("Jackson"), a friend of Pray's, to testify at trial. Jackson was prepared to  
26 testify that he had personally observed a blue truck following Pray on one occasion  
and that he considered William "Bud" Baker to be dangerous. Even assuming that

1 trial counsel was deficient for not calling Jackson to testify, we conclude that Pray has  
 2 failed to demonstrate that, but for this error, the outcome of the trial would have been  
 3 different. Therefore, we hold that Pray has failed to show that he suffered any  
 prejudice.

4 ECF No. 21, p. 348-49 (footnotes omitted). With regard to the allegations involving counsel's  
 5 failure to call Alan Richards and Jim Thomas, the court added these footnotes:

6 [Footnote 3:] Pray also argues that defense counsel was ineffective for failing  
 7 to call Alan Richards ("Richards"), Michelle's brother, to testify at trial. However,  
 8 the record very clearly states that Richards could not be located for trial. As a result,  
 his testimony from a preliminary hearing was read into the record. Therefore, we  
 conclude that Pray has failed to show that his counsel was deficient.

9 [Footnote 4:] Pray also argues that trial counsel was ineffective for failing to  
 10 call Jim Thomas ("Thomas") to testify at trial. However, Pray clearly states that  
 11 Thomas was available to testify should any of the relevant witnesses recant their  
 12 previous statements. Because Pray does not allege that any of the witnesses recanted  
 their testimony, counsel's decision to not call Thomas was reasonable.

13 *Id.*

14 Here again, the Nevada Supreme Court applied the correct federal law standard. In addition,  
 15 fair-minded jurists could conclude that the court reached the right decision in determining that Pray  
 16 was not deprived of effective assistance of counsel as a result of counsel failing to call the designated  
 17 witnesses. Because Thomas's knowledge about the case was based on what other people had told  
 18 him, it is unlikely that he would have been able to provide admissible testimony helpful to Pray's  
 19 case. Pray has not shown that the state court's conclusions regarding the remaining proposed  
 20 witnesses were so erroneous that relief from this court is warranted.<sup>3</sup> *See Richter*, 131 S.Ct. at 786-

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21  
 22 <sup>3</sup> Pray cites to Jim Thomas as the source for the testimony that Neil Stiller, Michelle Richards,  
 23 and Stephen Jackson would have supposedly been able to provide. ECF No. 56, p. 29-32; ECF No. 86,  
 24 p. 26-29. While Pray's pleadings reference Exhibit 44 and a "Jim Thomas Affidavit," the only document  
 25 generated by Thomas located at Exhibit 44 is a letter from Thomas addressed to defense counsel. ECF  
 26 No. 21, p. 142-44. The letter does not mention Stiller or Jackson. It does mention Michelle Richards,  
 but does not support Pray's allegations as to the testimony she would have been able to provide. Instead,  
 Thomas states in the letter, "Over the period of time that I was dealing with Michelle Richards, it  
 became apparent to me that she was mentally unbalanced and that I would be unable to trust any

87 (“As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”).

*Ground Six(E)*

Ground Six(E) alleges that counsel was ineffective in failing to seek a mistrial due to improper juror contact with the victim’s family and with the prosecutor’s investigator. As noted above, this claim was subject of an evidentiary hearing conducted in state district court in Pray’s first state post-conviction proceeding. The state district court issued a written decision recounting the evidence, which included testimony from six of the 12 jurors and affidavits from the remaining six. ECF No. 21, p. 484-88.

Addressing the issue on appeal, the Nevada Supreme Court stated as follows:

On May 25, 2001, the district court conducted an evidentiary hearing. At the evidentiary hearing, the district court heard testimony from numerous witnesses including Pray, Pray’s brother-in-law, Pray’s sister, the victim’s mother, the victim’s sister, and six of the twelve jurors. [Footnote 4 – The remaining six jurors submitted notarized affidavits because they were unavailable to testify. We note that neither party to this appeal has provided this court with the affidavits. On appeal, however, neither party disputes the contents of the affidavits. Accordingly, we have resolved this issue without reviewing the affidavits based on the parties’ discussion of the contents of the affidavits.] On June 21, 2002, the district court denied the petition, finding trial counsel was not ineffective for failing to move for a mistrial on the grounds of juror misconduct. Specifically, the district court found no credible evidence of juror misconduct because the six jurors who testified each stated that he or she: (1) did not have communications with anyone outside the jury; and (2) did not observe any other jurors communicating with anyone outside of the jury. [Footnote 5 – Although Pray, his sister, and brother-in-law testified about several instances of juror misconduct, the district court did not find that testimony credible. *See generally Williams v. State*, 113 Nev. 1008, 1014, 945 P.2d 438, 442 (1997) (noting that

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information which she did furnish me.” *Id.*, p. 142.

While Pray’s errors in citing to the record are bothersome, the lack of supporting evidence does not impact in any way this court’s conclusions as to the deference to be afforded the state supreme court’s determinations. Even if Pray is able to substantiate his claims as to the testimony the witnesses would have been able to provide, the Nevada Supreme Courts conclusions are still entitled to deference under 28 U.S.C. § 2254(d).

1 determining the weight and credibility to give conflicting testimony is within the  
2 province of the trier of fact, and credibility determinations will not be reversed absent  
clear error).]

3 The district court's factual findings regarding a claim of ineffective assistance  
4 of counsel are entitled to deference when reviewed on appeal. [Footnote 6 – *See Riley*  
5 *v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).] Pray has not demonstrated  
6 that the district court's findings of fact are not supported by substantial evidence or  
are clearly wrong. [Footnote 7 – *See id.*] Moreover, Pray has not demonstrated that  
the district court erred as a matter of law. [Footnote 8 – *See id.*]

7 ECF No. 21, p. 545-46

8 The Nevada Supreme Court's decision on this claim is unassailable and stands as a  
9 paradigmatic example of one to which the federal court must defer under 28 U.S.C. § 2254(d).  
10 Relief is denied with respect to Claim Six(E).

11 *Grounds Six(G)(1), Six(H), and Ground Six(I)*

12 Grounds Six(G)(1), Six(H), and Six(I) allege ineffectiveness based on counsel's alleged  
13 failure to investigate and present certain facts that would have supported Pray's self-defense theory.  
14 With these claims, Pray alleges that counsel was ineffective in failing to present evidence showing  
15 that the victim was known to carry a gun and had a reputation for violence, evidence of the victim's  
16 habit of cocaine use and his relationship with Michelle Richards, and the testimony of Michelle  
17 Richards as to certain facts.

18 Pray relies upon information provided by former neighbors of the victim (the Cravens) as  
19 evidence that the victim was known to carry a gun and had a reputation for violence. The Nevada  
20 Supreme Court, having cited the *Strickland* standard, addressed this aspect of Pray's ineffective  
21 assistance claim as follows:

22 Pray also alleges that trial counsel was ineffective for failing to contact the  
23 Cravens because they possessed evidence that Ghiglione was known to carry a gun  
24 and had a reputation for violence. In light of our previous conclusion that Craven's  
25 testimony was inadmissible, we conclude that this argument lacks merit.  
26

1 ECF No. 21, p. 351. For the reasons discussed below in relation to Ground Seven, this was a  
2 reasonable application of federal law.

3 As for counsel's alleged failure to present evidence of the victim's habit of cocaine use and  
4 his relationship with Michelle Richards, the Nevada Supreme Court decided as follows:

5 Pray next alleges that trial counsel was ineffective for failing to present  
6 evidence of Ghiglione's alleged cocaine use and his relationship with Michelle. We  
7 conclude that testimony regarding Ghiglione's alleged drug use or the likelihood that  
8 Ghiglione would follow Michelle is not the type of reputation evidence contemplated  
9 by NRS 48.045(1)(b). Therefore, we find that Pray has failed to demonstrate that trial  
10 counsel was deficient.

11 ECF No. 21, p. 349-50.<sup>4</sup> Once again, Pray has not shown that this decision was contrary to, or  
12 involved an unreasonable application of, federal law.

13 Grounds Six(G)(1), Six(H), and Six(I) are denied.

#### 14 **Ground Seven**

15 In Ground Seven, Pray claims that the prosecutor withheld exculpatory evidence from  
16 defense counsel in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, Pray alleges  
17 that a former neighbor of the victim had contacted the prosecutor about the victim's short temper and  
18 propensity for violence, but that the prosecutor never passed this information along to defense  
19 counsel.

20 Pray's investigator in his first state post-conviction proceeding, Robert Temple, interviewed  
21 the neighbor, Mark Craven, and his wife in 1998. Pray submitted Temple's affidavit with his state  
22 petition. ECF No. 21, p. 155-58. According to that affidavit, Craven related to Temple three  
23 separate incidents involving Peter Ghiglione: an argument between Ghiglione and Ghiglione's wife  
24 that prompted Craven and his wife to call the police, a threat to "physically beat up [] Craven" issued

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25 <sup>4</sup> Pray's allegations under Ground Six(I) regarding counsel's failure to present the testimony of  
26 Michelle Richards are, in essence, a reiteration of allegations included in Ground Six(C). The Nevada  
Supreme Court's treatment of those allegations and this court's conclusions as to such are set forth in  
this court's discussion of Ground Six(C), above.

1 after Ghiglione saw Craven trying to distract Ghiglione's barking dog by throwing pebbles, and a  
2 statement Ghiglione made when Craven asked him to stop shooting pigeons off his roof (which  
3 Craven perceived as a threat). *Id.* The affidavit also states that Craven and his wife described  
4 Ghiglione as "a very physical and volatile man" and that Craven was of the opinion that Ghiglione  
5 would "go after" a person if he had a problem with that person. *Id.*, p. 156.

6 As for Craven providing this information to the prosecutor, the affidavit states that Craven  
7 told the investigator that he "wrote to [the prosecutor], left phone messages and personally left a  
8 written message with the DA's office requesting a call back." *Id.* at 156-57. According to the  
9 affidavit, the prosecutor never responded. *Id.*

10 A prosecutor's obligation to disclose information favorable to the defense is well-established  
11 under *Brady* and its progeny. *See, e.g., Giglio v. United States*, 405 U.S. 150 (1972) and *Kyles v.*  
12 *Whitley*, 514 U.S. 419 (1995). As explained by the Ninth Circuit Court of Appeals in *Carriger v.*  
13 *Stewart*, 132 F.3d 463 (9th Cir. 1997):

14 The prosecution is obligated by the requirements of due process to disclose  
15 material exculpatory evidence on its own motion, without request. *See Kyles v.*  
16 *Whitley*, 514 U.S. 419, 432-34 (1995); *United States v. Bagley*, 473 U.S. 667, 682  
17 (1985). Evidence is material, and must be disclosed, "if there is a reasonable  
18 probability that, had the evidence been disclosed to the defense, the result of the  
19 proceeding would have been different." *Kyles*, at 433; *Bagley*, 473 U.S. at 682. A  
"reasonable probability" does not require showing by a preponderance that the  
outcome would have been different. *See Kyles*, at 433-35. Rather, a "reasonable  
probability" is a probability sufficient to undermine confidence in the outcome."  
*Bagley*, 473 U.S. at 682.

20 *Id.* at 479.

21 In addressing this claim on appeal in Pray's first state post-conviction proceeding, the Nevada  
22 Supreme Court concluded as follows:

23 As his final argument, Pray alleges that the State violated his due process  
24 rights by concealing exculpatory evidence. Pray argues that Mark Craven ("Craven"),  
25 a former neighbor of Ghiglione, who possessed exculpatory evidence, contacted the  
26 State. "It is a violation of due process for the prosecutor to withhold exculpatory  
evidence, and his motive for doing so is immaterial." *Wallace v. State*, 88 Nev. 549,

551-52, 501 P.2d 1036, 1037 (1972). This court has held that “[a] prosecutor must disclose evidence favorable to an accused when that evidence is material either to guilt or to punishment.” *Roberts v. State*, 110 Nev. 1121, 1127, 881 P.2d 1, 5 (1994). “In determining whether material should be considered *Brady* material, the court should look at the following elements: ‘(a) suppression by the prosecution after a request by the defense, (b) the evidence’s favorable character for the defense, and (c) the materiality of the evidence.’” *Homick v. State*, 112 Nev. 304, 314, 913 P.2d 1280, 1287 (1996) (quoting *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972)).

We conclude that the information held by Craven would be inadmissible character evidence under NRS 48.045(1)(b). NRS 48.045(1)(b) permits the admission of the deceased victim’s general character offered by the accused, whether the accused had knowledge of the victim’s character or not. *See id.* However, in this instance, Craven’s proffered testimony was of specific instances of violence. Therefore, we conclude that they would not have been admissible because Pray was not aware of them prior to the shooting. Accordingly, we find that the district court did not err by failing to grant Pray’s petition for a writ of habeas corpus.

ECF No. 21, p. 350-51 (footnote omitted).

Pray argues that the Nevada Supreme Court’s decision is not entitled to deference because the court premised its decision on an erroneous application of state evidence law and “failed to analyze [the] claim specifically under the Supreme Court’s decision in *Brady*.” ECF No. 86, p. 37-38. This argument misses the mark.

The Nevada Supreme Court did, in fact, analyze the claim under *Brady*. It merely concluded that the undisclosed evidence was not material under *Brady* because it was inadmissible at trial. This was a reasonable application of federal law. *See Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (holding that state’s failure to disclose results of witness’s polygraph test did not deprive defendant of “material” evidence under *Brady* rule because the results were been inadmissible under state law). As for whether the Nevada Supreme Court was wrong in concluding that the evidence was inadmissible, this court is bound by the state court’s interpretation and application of its own laws. *See Williams v. Calderon*, 52 F.3d 1465, 1480-1481 (9<sup>th</sup> Cir. 1995). Accordingly, the state court’s determination on that point may not be second-guessed.

Ground Seven is denied.

\\



1 IV. CONCLUSION

2 For the reasons set forth above, Pray's petition for habeas relief is denied.

3 *Certificate of Appealability*

4 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing  
5 Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA).  
6 Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the  
7 issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9<sup>th</sup> Cir.  
8 2002).

9 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a  
10 substantial showing of the denial of a constitutional right." With respect to claims rejected on the  
11 merits, a petitioner "must demonstrate that reasonable jurists would find the district court's  
12 assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484  
13 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA  
14 will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the  
15 denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

16 The COA standard is not high. Pray must only "'sho[w] that reasonable jurists could  
17 debate'" the district court's resolution or that the issues are "'adequate to deserve encouragement to  
18 proceed further.'" *Hayward v. Marshall*, 603 F.3d 546, 553 (9<sup>th</sup> Cir. 2010) (en banc) (citations  
19 omitted). Having reviewed its determinations and rulings in adjudicating Pray's petition, the court  
20 finds that the *Slack* standard is met with respect to the court's denial of Ground Six(B). The court  
21 therefore grants a certificate of appealability as to that issue. The court declines to issue a certificate  
22 of appealability for its resolution of any procedural issues or any of Pray's other habeas claims.

23 **IT IS THEREFORE ORDERED** that petitioner's second amended petition for writ of  
24 habeas corpus (ECF No. 56) is DENIED. The Clerk shall enter judgment accordingly.



Dated March 12, 2014.

25